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BEFORE THE COPYRIGHT ROYALTY JUDGES

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In the Matter of:)

) Docket No.

MECHANICAL AND DIGITAL) 2006-3-CRB DPRA

PHONORECORD DELIVERY RATE) Volume 2 - A.M.

ADJUSTMENT PROCEEDING.) Pgs. 289 - 396

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Washington, D.C.

Tuesday, January 29, 2008

The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Deborah Larson Hommer, of Capital Court Reporting, a Notary Public in and for the District of Columbia, beginning at 9:34 a.m.

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Copyright Royalty Board

1 A P P E A R A N C E S

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4 JUDGE WILLIAM ROBERTS

5 JUDGE STANLEY C. WISNIEWSKI

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1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Thank you. We
3 will come to order. Mr. Freedman, is Molly doing
4 all right?

5 MR. FREEDMAN: Yes, Your Honor.

6 CHIEF JUDGE SLEDGE: All right.
7 Mr. Bloch?

8 MR. SMITH: Your Honor, I might inquire
9 before Mr. Faxon testifies, we did have a motion
10 in limine on his testimony. Are we to assume that
11 that motion is no longer pertinent?

12 CHIEF JUDGE SLEDGE: No.

13 MR. SMITH: Is the testimony -- should
14 we have an argument on that issue before or should
15 we just wait until he says something? How would
16 you like me to handle that?

17 CHIEF JUDGE SLEDGE: I think with the
18 pending motion it would be appropriate to take
19 that now.

20 MR. SMITH: Your Honor, our position,
21 as we have laid out in the motion, is that there
22 is considerable testimony proposed for Mr. Faxon

1 in sections 6 and 7 of his testimony that is not
2 admissible coming from a lay witness under Federal
3 Rules of Evidence 701. That's the rule that
4 governs lay opinion, and it specifies that lay
5 opinion, as opposed to expert opinion, has to be
6 rationally based on the perception of the witness,
7 helpful to a clear understanding of the witness'
8 testimony or the determination of a fact in issue
9 and, most importantly, not based on scientific,
10 technical or other specialized knowledge within
11 the scope of Rule 702.

12 Rule 702, of course, governs expert
13 testimony and says specialized, technical or
14 scientific information has to come in through a
15 qualified expert who is entitled, because he is an
16 expert, to express opinions about those kinds of
17 matters.

18 And what we see in this portion of
19 Mr. Faxon's testimony is essentially a warmed-over
20 summary of the expert economic opinions that the
21 publishers and songwriters propose to offer
22 through Dr. Landes, who essentially makes all the

1 same points, points requiring specialized economic
2 abilities and knowledge and training about what an
3 appropriate benchmark would be, what the rate
4 would be in a free hypothetical market, what rate
5 is necessary to provide the appropriate incentives
6 to create the right amount of creativity in the
7 marketplace, what the value is of music --
8 downloaded music versus music sold on a CD.

9 These are all not only clearly economic
10 opinions; they're the exact same opinions that
11 Dr. Landes will give in his -- wearing his expert
12 hat. So we see, A, no purpose to having a fact
13 witness reiterating all of those opinions, and we
14 think it is inappropriate for him to do that under
15 Rule 701, and there is a very good reason. As you
16 look at -- if you look at the advisory committee
17 note to Rule 701 it says they added that proviso
18 that it can't be based on scientific or technical
19 or specialized knowledge because they wanted to
20 prevent exactly what's occurring here, the
21 presentation of expert opinion testimony through
22 the guise of a fact witness. So that's our

1 position.

2 We set out in appendix A to the motion
3 the specific sentences in Mr. Faxon's testimony
4 that we think violates 701 and ought to be
5 excluded on that basis.

6 JUDGE ROBERTS: Mr. Smith, aren't most
7 of these statements of Mr. Faxon merely
8 generalized statements as to, well, we need an
9 increase in rates, it would be reasonable for us
10 to have more money? What's the specific problem
11 with some of those?

12 MR. SMITH: Well, Your Honor, we have
13 actually, I think, been -- anticipate being pretty
14 tolerant of testimony that's just argument. For
15 example, Mr. Israelite's testimony is basically
16 just their legal argument and their position and
17 who is the head of the NMPA, and I'm not going to
18 object to that.

19 But what you have with Mr. Faxon, if
20 you turn over to page 17 of our motion -- that's
21 the third page of the appendix -- we have, for
22 example, in the second bullet point there, "These

1 rates, all the result of arm's-length
2 negotiations, show that the current statutory rate
3 is well below rates that would be negotiated in a
4 free market, notwithstanding the constraining
5 effect of the compulsory license."

6 He is essentially giving the exact
7 testimony that you hear all the time from
8 economists about what would be the rate in a free
9 market, in a hypothetical market, based on some
10 benchmark which he has expressed the opinion is an
11 appropriate benchmark for establishing the rate.

12 He basically says, for example, I think
13 Ring Tones is a great benchmark to use for
14 establishing the rate for downloads. Now, there's
15 a lot of reasons why that might be true or might
16 not be true, but it's not an opinion that
17 Mr. Faxon has any expertise about offering. He is
18 a businessman. He has a lot of financial
19 accounting abilities. He was the CFO for a while
20 of the company. But he is not an economist.

21 Another example -- he has a whole
22 section about the sync rights market and how the

1 sync rights market is an appropriate benchmark for
2 setting rates for these kinds of royalties. We
3 have obviously had lots of discussion about that
4 in prior proceedings. It's done through
5 economists, experts who give that opinion which
6 the court then considers and evaluates.

7 So it is primarily the benchmark
8 analysis that I think is most egregious. This is
9 not just simply saying, we need more rate -- we
10 need more money, we're losing songwriters, we're
11 poor. It's saying, here is an economic argument
12 for why, in a hypothetical market, the rate would
13 be set at a particular level.

14 JUDGE ROBERTS: I noticed, in looking
15 at the highlighted portions that you have of his
16 testimony, that you seek to have stricken a phrase
17 that keeps coming up in a lot of them, is value of
18 music or the value of a song. Is that the
19 gravamen of your objection when he talks about
20 value of music?

21 MR. SMITH: There is a whole section of
22 his testimony about the enhanced value of music,

1 which we certainly do object to. That plus the
2 benchmarks I think are the most important pieces
3 of it.

4 JUDGE ROBERTS: Are you saying because
5 he is a fact witness, he can't talk about value as
6 opposed to that we need an expert only to talk
7 about value?

8 MR. SMITH: I am saying that, Your
9 Honor. I think in a rate setting proceeding when
10 you have somebody come in and say the value of
11 this product ought to be pegged here as opposed to
12 here, that's something an economist should give an
13 opinion about. That's not something a businessman
14 gives an opinion about.

15 JUDGE WISNIEWSKI: Wouldn't the
16 businessman have some experience that would be
17 useful on that issue?

18 MR. SMITH: Well, certainly the rules
19 allow businessmen to give opinions about their
20 businesses. For example, it is quite common for a
21 person in business to be able to give an opinion
22 about the value of their business. But to say in

1 a hypothetical market or in a free market or in a
2 fair market the price --

3 JUDGE WISNIEWSKI: Wouldn't they have
4 some knowledge of prices in their market?

5 MR. SMITH: They may have some
6 knowledge, Your Honor, but what the rules say is
7 that when you're doing something that's really
8 what an economist does, you ought to have an
9 economist. That's our position. That's what the
10 rules say.

11 But, obviously, you know, this is a
12 matter in the court's discretion. If the court
13 feels that it will be helpful, obviously -- we're
14 simply raising the issue because we do think that
15 a strict application of Rule 701 would exclude
16 this evidence.

17 CHIEF JUDGE SLEDGE: Thank you.
18 Response?

19 MR. BLOCH: Your Honor, my view of this
20 motion, as we have said in our opposition papers,
21 is that it's nothing short --

22 JUDGE ROBERTS: Counsel, would you

1 identify yourself?

2 MR. BLOCH: Sure. My name is Bob Bloch
3 from Mayer Brown. My view of this motion, as
4 we've said in our opposition papers, is nothing
5 short of an effort to keep one of the most
6 experienced, knowledgeable executives in the music
7 publishing business from sharing that knowledge
8 and information with this court and from talking
9 about contracts that he and his company, the
10 largest music publishing company in the world,
11 have entered into with members of the RIAA and
12 DiMA that are directly relevant to these
13 proceedings. In fact, I can't think of anything
14 that is more directly focused on these
15 proceedings.

16 Rule 701 clearly permits lay opinion
17 testimony as long as it is factually based and
18 will be helpful for a clear understanding of the
19 issues and determination of facts, and is not
20 based on scientific, technical and specialized
21 knowledge within the scope of Rule 702.

22 There is a long history of cases

1 allowing business owners and executives to provide
2 lay opinion testimony, like Mr. Faxon will
3 provide, based on their everyday work and
4 professional experience.

5 CHIEF JUDGE SLEDGE: Isn't that based
6 on their own business? Isn't that limited to,
7 say, an owner can say, my business is worth this?

8 MR. BLOCH: Sure. Sure.

9 CHIEF JUDGE SLEDGE: Well, if that
10 owner is not a corporation.

11 MR. BLOCH: That's correct.

12 CHIEF JUDGE SLEDGE: An individual can
13 say, my business is worth this.

14 MR. BLOCH: Sure.

15 CHIEF JUDGE SLEDGE: But can an
16 individual say that either a corporate business is
17 worth so and so or someone else's business is
18 worth so and so?

19 MR. BLOCH: Well, a corporate executive
20 can certainly talk about his knowledge and
21 experience of his own business, of his everyday
22 experience with that business.

1 CHIEF JUDGE SLEDGE: But he can't say
2 what it's worth?

3 MR. BLOCH: Well, he is not giving a
4 valuation here of what his business is worth.

5 CHIEF JUDGE SLEDGE: Well, you were
6 giving generalities, and I was responding. A
7 corporate representative cannot say what the
8 business for which he works is worth, can he?

9 MR. BLOCH: Well, I think it would
10 depend on the specific circumstances of what the
11 scope of his knowledge would be.

12 CHIEF JUDGE SLEDGE: And you're wrong.
13 I think that requires an expert.

14 MR. BLOCH: All right. Well, in this
15 particular case, Mr. Faxon has prodigious
16 experience that would be relevant and helpful to
17 the court. In fact, he has been EMI's group
18 senior vice president for worldwide business
19 development and strategy. He has been the
20 executive vice president and chief financial
21 officer of EMI Music Publishing. He has been the
22 chief financial officer of EMI Group. He has been

1 the president and chief operating officer of EMI
2 Music Publishing. He has been the co-CEO and
3 as -- chairman and CEO of EMI Music Publishing.
4 His testimony will be very valuable to the court
5 and, in fact, as Mr. Laguarda said yesterday --
6 twice he referred to statements that Mr. Faxon had
7 made and thought were insightful.

8 But the fact of the matter is that
9 Mr. Faxon offers a unique perspective from someone
10 who has spent 14 years at the largest music
11 publishing company in the world. He has seen both
12 the music side of the business, the music
13 publishing side of the business, and he will
14 testify about his extensive firsthand experience
15 in dealing with songwriters, with EMI Music
16 Publishing's own contracts involving ring tones,
17 the new digital media agreements with Sony BMG,
18 Universal and Warner, its unique arrangements with
19 Skype and SpiralFrog, and EMI's finances, and his
20 knowledge of industry conditions based on his
21 experience in the senior executive positions that
22 he has held.

1 This motion also challenges whether
2 Mr. Faxon has sufficient personal knowledge of the
3 Ring Tone agreements, and the RIAA motion is
4 premature completely on this issue. No one has
5 heard his foundation testimony about what his
6 knowledge and experience is in direct connection
7 with these agreements. The fact of the matter is
8 that he will testify that he was directly involved
9 in these Ring Tone agreements, he helped set the
10 parameters for those agreements that were
11 eventually entered into and executed.

12 CHIEF JUDGE SLEDGE: He has given his
13 direct testimony already, so he is not going to be
14 able to testify to anything that's not in his
15 written testimony.

16 MR. BLOCH: Correct.

17 CHIEF JUDGE SLEDGE: So if it's not in
18 there now, then it's not premature.

19 MR. BLOCH: Well, I was referring to
20 his deposition testimony. The motion made
21 reference to the fact that Mr. Faxon, during his
22 deposition, did not provide adequate foundation

1 testimony about his knowledge in connection with
2 Ring Tone agreements. His testimony --

3 CHIEF JUDGE SLEDGE: Does that change
4 anything of what I said?

5 MR. BLOCH: No, not at all. In fact,
6 he has provided more than sufficient foundation
7 testimony in his written statement.

8 CHIEF JUDGE SLEDGE: Well, I don't
9 understand your point that it's premature, then.

10 MR. BLOCH: Well, it's premature in the
11 sense that they're making an objection now to the
12 fact that he does not have specific knowledge or
13 will not be able to testify about his knowledge
14 concerning the circumstances surrounding the Ring
15 Tone agreements. In other words, they said he
16 essentially admitted that he didn't know anything
17 about them, and that's not correct.

18 He has provided written testimony about
19 the Ring Tone agreements in which he demonstrates
20 his knowledge and the foundation for that
21 knowledge, and he will give that testimony here
22 today.

1 CHIEF JUDGE SLEDGE: Well, that sounds
2 to me like it's not premature, but it's wrong. I
3 don't understand the word "premature."

4 MR. BLOCH: It is incorrect. It is
5 incorrect. But this court has a great deal of
6 discretion in terms of allowing testimony like
7 being presented by Mr. Faxon who has had, as I
8 say, 14 years of experience in the industry, he
9 has been directly involved in the finances and the
10 music publishing business. He has worked with
11 songwriters. He has been involved in the
12 licensing of EMI's compositions. And he knows as
13 much about this aspect of the business as anybody
14 in the music publishing business today, and I
15 think that would be directly relevant and helpful
16 to this court's understanding of the context in
17 which this business is operated and the rates that
18 this court is considering.

19 JUDGE WISNIEWSKI: Mr. Bloch, would you
20 address Mr. Smith's argument about the specific
21 items that he seeks exclusion on being repetitive
22 of other witnesses' testimony?

1 MR. BLOCH: Your Honor, with respect to
2 that, I don't think it is repetitive at all. It
3 is not uncommon in any kind of proceeding like
4 this, where you have experts who actually give
5 opinions under 702, to base those opinions on the
6 underlying factual information that's in the
7 record. So the fact that Professor Landes has
8 actually looked at, studied EMI's data, EMI's
9 contracts, whether there are Ring Tone agreements
10 in the digital agreements, the sync licenses, the
11 agreements with Skype and SpiralFrog -- it's
12 totally unremarkable that Dr. Landes would rely on
13 those facts in reaching his opinion.

14 So it turns out that EMI and Mr. Faxon
15 were directly involved in those agreements. His
16 testimony will concern the facts of those
17 agreements, what they are, what the rates were in
18 those agreements and the circumstances around
19 them. So he is not offering any opinion testimony
20 that is specialized knowledge, scientific
21 knowledge that would fall within the scope of 702.
22 It is particularized knowledge under 701 that is

1 within his experience.

2 JUDGE WISNIEWSKI: Is it just a
3 coincidence that he comes to the same conclusions?

4 MR. BLOCH: Well, I think --

5 JUDGE WISNIEWSKI: Based on the
6 different analysis.

7 MR. BLOCH: Well, I don't know that
8 it's a coincidence at all. I mean, I think the
9 facts drive to that result. And if he has that
10 independent judgment about what it is and
11 Mr. Landes -- Dr. Landes has those same views, I
12 don't think Mr. Faxon's testimony should be
13 disregarded at all. I mean, it's based on his
14 everyday personal experience and professional
15 experience.

16 JUDGE WISNIEWSKI: Thank you.

17 CHIEF JUDGE SLEDGE: Does that last
18 question summarize this motion: Is a fact witness
19 entitled to come to a conclusion?

20 MR. BLOCH: I think a fact witness is
21 able to make observations and draw inferences from
22 the facts of what he knows.

1 CHIEF JUDGE SLEDGE: It cannot come to
2 a conclusion?

3 MR. BLOCH: Well, he is not expressing
4 an expert economic opinion, if that's your
5 question.

6 CHIEF JUDGE SLEDGE: No. My question
7 is, is a fact witness permitted to come to a
8 conclusion?

9 MR. BLOCH: I think a fact witness can
10 come to a conclusion if it's rationally based on
11 the facts within his knowledge and experience.

12 CHIEF JUDGE SLEDGE: A fact witness can
13 gives facts and can say what the inferences from
14 those facts are --

15 MR. BLOCH: That's correct.

16 CHIEF JUDGE SLEDGE: -- but cannot
17 conclude anything from those facts.

18 MR. BLOCH: Well, he is not --
19 Mr. Faxon is not going to be expressing any
20 opinions or economic opinions. As I've said at
21 the beginning, he can draw reasonable inferences
22 based on his experience, and that's all he is

1 going to do.

2 JUDGE ROBERTS: Mr. Bloch, you just
3 said that Mr. Faxon is not going to be expressing
4 any economic opinions. I would like you to look
5 at page 28 of his testimony, and starting off with
6 paragraph 53. In the last sentence of
7 paragraph 53 -- in the previous sentence he has
8 mentioned that EMI, MP and other publishers have
9 negotiated numerous arm's-length agreements. He
10 then says, in the last sentence -- and this is one
11 of the sentences that the RIAA seeks to have
12 stricken -- "These agreements demonstrate that the
13 rates being proposed by the publishers are
14 consistent with the rates that would be negotiated
15 in a free market."

16 What's Mr. Faxon's qualifications to be
17 talking about what would be negotiated in a free
18 market, and isn't that, in fact, exactly what
19 expert economic testimony is [sic]?

20 MR. BLOCH: Well, I think what he is
21 referring to with regard to the -- these are the
22 Ring Tone agreements? What he was testifying to

1 here was that the agreements involving ring tones
2 in particular were not at the time subject to 115.
3 The Register had not made that decision yet. So
4 they were being negotiated in an open market, at
5 least from EMI's point of view.

6 And so the rates that were negotiated
7 that are actually in those Ring Tone agreements
8 line up with the proposal that is being made by
9 the music publishers. And so from his experience,
10 the inference he was drawing from that was that
11 his experience was consistent with the proposal
12 the NMPA was making and, in his view, those rates
13 for the Ring Tone agreements were similar to what
14 he might expect in a free market.

15 JUDGE ROBERTS: But isn't anybody who
16 is speculating on what would take place in a free
17 market -- that seems to me to be the direction of
18 an expert witness. Certainly if Mr. Faxon was
19 saying, well, we negotiated these agreements with
20 several publishers and -- excuse me, several
21 record companies, and this is what we came out
22 with, I don't think there would be any question

1 that's within his expertise. But he seems to be
2 going well beyond that.

3 He does that again in paragraph 55 on
4 the same page where -- and this, again, is a
5 sentence that RIAA seeks to strike -- where he is
6 talking about what would be negotiated makes it
7 clear that the rates upon -- agreed upon are
8 likely to be below those that would be agreed upon
9 in a truly free market.

10 That's, to me, to be an economist
11 talking about how a free market operates, not a
12 fact witness.

13 MR. BLOCH: I think what Mr. Faxon was
14 expressing here was simply the fact that at the
15 time these contracts were negotiated, the Register
16 had not ruled on whether or not ring tones were
17 subject to 115. So from EMI's point of view, when
18 it negotiated these particular contracts, it
19 believed it was negotiating within a free market
20 because there was no limitation on what could be
21 negotiated.

22 So that is what the reference is.

1 That's what was meant by this statement.

2 JUDGE ROBERTS: Okay. Let's go on a
3 little further into his testimony. I'm looking at
4 page 33, paragraph 65. Again, a sentence or a
5 provision -- two sentences that RIAA seeks to
6 strike. And, in particular, in the last sentence
7 it says, "Indeed, the actual free market value of
8 these compositions would be higher than the rates
9 negotiated in the NDMA's because it would not be
10 even partially constrained by the statutory rate."

11 Now, again, it's talking about the
12 actual free market value. How is Mr. Faxon
13 qualified to talk about what the free market value
14 of compositions is or is not?

15 MR. BLOCH: Some of the rates that were
16 negotiated, particularly the ring tone rates in
17 the New Digital Media Agreements which were
18 negotiated in the 2004 period -- once again, prior
19 to the time that ring tones were ruled to be
20 within the scope of 115 -- Mr. Faxon and his team
21 negotiated these rates in a market that they
22 believed to be not subject to 115, but essentially

1 an open market.

2 He also believed that the rates would
3 likely have been higher because the other side to
4 these agreements was arguing that they were within
5 the scope of 115 and, thereby, constrained by 115.
6 So he is expressing his experience and his view
7 that those rates were not only negotiated in a
8 market that was largely free, but would have
9 likely been higher if there wasn't this debate or
10 dispute about whether 115 applied.

11 JUDGE ROBERTS: Isn't that exactly
12 expert opinion --

13 MR. BLOCH: I don't think --

14 JUDGE ROBERTS: -- as to what the free
15 market would support or not support?

16 MR. BLOCH: I think the inference that
17 he drew from the statement he made is based on his
18 experience of what rate he could get and what he
19 thought was a free market at the time. And it was
20 just his view that that would be higher if the
21 other side did not believe 115 applied. So I
22 think he was drawing an inference from the

1 negotiations and the debate that was going on
2 between the parties.

3 And he was involved in those
4 negotiations or he was informed about those
5 negotiations, and I think he was in a position to
6 draw that inference.

7 JUDGE ROBERTS: You use the word
8 "inference." It sounds more like opinion to me.

9 MR. BLOCH: Well, Mr. Faxon's testimony
10 here today is going to relate solely to the facts
11 of those agreements, what they were, when they
12 were entered, what the rates are. And his
13 testimony will identify those facts that are
14 pertinent to this proceeding.

15 CHIEF JUDGE SLEDGE: Thank you.
16 Anything by DiMA?

17 MR. CONNOLLY: Nothing, Your Honor.
18 Thank you.

19 CHIEF JUDGE SLEDGE: Mr. Smith?

20 MR. SMITH: Nothing further, unless
21 there is a question.

22 JUDGE WISNIEWSKI: Yes, Mr. Smith.

1 Wouldn't this particular motion be more
2 appropriate in a jury setting?

3 MR. SMITH: Well, Your Honor, I agree
4 with you that it would be more appropriate -- that
5 these kinds of evidentiary issues are more
6 sensitive and important in a jury trial, and
7 that's why I concluded my argument by saying if
8 the court feels it would be helpful, you obviously
9 are capable of evaluating the expertise of the
10 witness and differentiating between an economist
11 and a businessman. But we, as lawyers here, try
12 to enforce the rules. And -- so that's my answer.

13 JUDGE WISNIEWSKI: Thank you, sir.

14 CHIEF JUDGE SLEDGE: All right. Thank
15 you. We will recess and consider the motion.

16 (Recess.)

17 CHIEF JUDGE SLEDGE: Thank you. We
18 will come to order.

19 JUDGE ROBERTS: After deliberating this
20 issue, in our consideration of the RIAA motion,
21 the motion is granted in part, and the following
22 provisions of Mr. Faxon's testimony are stricken:

1 On page 28, at paragraph 53, the last sentence is
2 stricken. On that same page, 28, at paragraph 55,
3 the second sentence is stricken, as is the fifth
4 sentence beginning at the bottom of page 28 and
5 going to the top of page 29.

6 On page 30, all of paragraph 59 is
7 stricken. On page 33, paragraph 65, the second
8 sentence of paragraph 65 is stricken. And on
9 page 34, the last sentence at the bottom of the
10 page is stricken.

11 The motion is denied with respect to
12 the other requests of RIAA.

13 CHIEF JUDGE SLEDGE: Mr. Bloch?

14 MR. BLOCH: Your Honor, before
15 Mr. Faxon takes the witness stand, I plan to move
16 to admit Copyright Owners' Trial Exhibit 3, which
17 would be his statement and related exhibits,
18 subject to ruling today.

19 Mr. Faxon's statement and many of the
20 exhibits contain highly confidential EMI
21 information. And I would like to move to apply
22 the protective order to certain items within this

1 exhibit. After the entry of the court's
2 protective order last March, we submitted to the
3 court and the RIAA and DiMA a redaction log with
4 49 pages of EMI-specific matters listing all of
5 the places where we had designated material as
6 restricted within the scope of the protective
7 order. And with the court's permission, I would
8 like to hand you a copy of that log.

9 The redactions related to Mr. Faxon's
10 statement can be found on pages 3 and 4 of the
11 log. And the redactions related to Mr. Faxon's
12 exhibits can be found on pages 43 through 88, and
13 we have highlighted the relevant section. That
14 log is obviously much bigger than just Mr. Faxon's
15 testimony. If necessary, I am prepared to review
16 those restricted designations with the court,
17 unless the court and counsel for the RIAA and DiMA
18 have no objection.

19 MR. SMITH: Your Honor, might I inquire
20 something that Mr. Bloch --

21 CHIEF JUDGE SLEDGE: No, sir. You can
22 inquire something of me.

1 MR. SMITH: The question I have, which
2 perhaps maybe you can ask Mr. Bloch, then, Your
3 Honor, is, are the redactions proposed here the
4 same as the ones that are marked on our copies of
5 the testimony?

6 MR. BLOCH: Yes.

7 CHIEF JUDGE SLEDGE: The answer is yes.

8 (Laughter.)

9 MR. BLOCH: I might comment that, in
10 general, this is information which is non-public
11 information. A lot of it involves royalties,
12 advances, EMI's internal financial information,
13 contracts, the terms of those contracts, things
14 that would not be publicly disclosed which, within
15 the scope of the court's order, would
16 competitively disadvantage EMI or competitively
17 advantage one of its competitors.

18 CHIEF JUDGE SLEDGE: Mr. Bloch, you
19 suffer from the disability of having followed two
20 proceedings where attorneys have recited that
21 script with very little concern of what they're
22 saying.

1 JUDGE WISNIEWSKI: Mr. Bloch, are all
2 the agreements referred to here currently
3 operating agreements?

4 MR. BLOCH: Yes. Well, I should say
5 the New Digital Media Agreements are all in
6 effect. Skype, SpiralFrog is in effect. A number
7 of the Ring Tone agreements may have expired
8 because they have various terms. But there are 59
9 of those agreements, and they expire at different
10 times.

11 JUDGE WISNIEWSKI: I am particularly
12 concerned about the Ring Tone agreements because
13 they don't carry any dates in most cases.

14 MR. BLOCH: I can help the court in
15 that respect. There will be a -- Exhibit 18 to
16 Mr. Faxon's statement -- and we will provide the
17 court with that right now -- has a chart
18 summarizing all the Ring Tone agreements as well
19 as the agreements themselves.

20 And the dates -- the effective dates
21 began in September of '01, and the last one listed
22 was June of 2006 when they begin. Some of them go

1 into '07. A number of them have expired
2 previously.

3 But the terms are listed as well, and
4 those terms run from 2001 through as late as June
5 2007.

6 CHIEF JUDGE SLEDGE: And where -- can
7 we look at what you're looking --

8 MR. BLOCH: Exhibit 18. It's Copyright
9 Owners' 218.

10 JUDGE ROBERTS: Let me ask you this,
11 Mr. Bloch. I just happened to open to one of
12 these Ring Tone license agreements. This is
13 toward the front of Exhibit 218. This is the
14 agreement between Warner Strategic Marketing and
15 EMI. And according to this, this contract began
16 on January 1, 2002, and terminated on October 29,
17 2005. And my question to you is, since it has
18 been more than two years now that this agreement
19 has been expired, for what reason would we be
20 protecting confidentiality?

21 MR. BLOCH: Well, the terms of these
22 agreements -- they were all negotiated, of course,

1 privately. And EMI is continuously negotiating
2 with different people for these types of
3 agreements, including some of the same parties,
4 some of their competitors directly. And so EMI is
5 very concerned about not having the terms of these
6 agreements made public in a way so that when they
7 negotiate with competitors, competitors of the
8 people involved here, so that they see all of the
9 details and the financial arrangements that are
10 involved.

11 These agreements are usually negotiated
12 at arm's length between the parties directly, and
13 it would just disadvantage EMI in terms of its
14 strategy, its thinking, financial considerations
15 that it gives between one party that it negotiates
16 and what its strategy may be with others if all of
17 these agreements were made public.

18 JUDGE ROBERTS: I understand for an
19 active agreement you're concerned. But for one
20 that is now more than two years old, if someone
21 looked at this, what would they get out of it?
22 They would know how EMI negotiated during this

1 period, but they wouldn't know what the terms are
2 of current agreements, the rates or any of the
3 provisions set forth. This agreement wouldn't
4 tell you that.

5 MR. BLOCH: Well, certainly on expired
6 agreements that's true, but I know that this
7 information is proprietary to EMI, and they are
8 very, very concerned about how it can affect the
9 knowledge that people in the marketplace have.

10 JUDGE ROBERTS: And I appreciate their
11 concern, but what I am asking you is if their
12 concern is justified. For an expired agreement,
13 what in this agreement would be so sensitive that
14 EMI would need this protected and not revealed to
15 the world if it's more than two years old? It
16 doesn't seem that it's going to tell anybody what
17 the current license agreements that EMI has --
18 what terms and conditions those agreements have.

19 MR. BLOCH: My understanding, Your
20 Honor, is that when these agreements are
21 negotiated, they're obviously negotiated with the
22 understanding that they be confidential and that

1 the terms are confidential and that they will not
2 be made public. So even though this agreement has
3 expired, it doesn't mean it would not be of value
4 to competitors that would get their hands on these
5 documents and see them.

6 JUDGE ROBERTS: How long does that
7 continue? If we're doing the next rate adjustment
8 proceeding five years from now and we're looking
9 at this, does that still apply then?

10 MR. BLOCH: Probably not.

11 JUDGE ROBERTS: Well, I don't
12 understand, then -- what's the cutoff period here?

13 MR. BLOCH: Well, I don't know that
14 there is any magical date. I think the simple
15 fact is that the parties negotiated these things
16 with the understanding that they were
17 confidential. I don't know that they obviously
18 had any sense there would be a rate proceeding at
19 which they would be considered.

20 But I think they -- well, I know they
21 feel very, very strongly about the financial
22 information involved, the terms involved and how

1 they negotiate, what their strategy is and the
2 degree and extent to which these agreements reveal
3 that strategy.

4 JUDGE ROBERTS: It sounds to me, then,
5 that they would like it protected forever.

6 MR. BLOCH: Well, yes, if they had
7 their druthers, they would.

8 JUDGE WISNIEWSKI: Mr. Bloch, you say
9 that the parties have, in fact, negotiated a
10 confidentiality provision in these agreements. If
11 the agreements expire, doesn't that provision
12 expire?

13 MR. BLOCH: Technically, that's
14 correct. But as much as anything, these
15 agreements embody, I think, the negotiating
16 strategy of the parties and what their thinking
17 was about the terms and what they should be. And
18 that is as important to them as the actual
19 pendency of the agreement.

20 CHIEF JUDGE SLEDGE: Mr. Smith?

21 MR. SMITH: Your Honor, my only comment
22 about this is that I think we're taking this

1 slightly out of -- two comments. First of all, I
2 think we're doing it a little out of order
3 because, as I understand it, the exhibit hasn't
4 been offered into evidence yet. And there are a
5 couple of pieces of it that he is seeking to be
6 subject to a protective order where I am going to
7 have an objection to the whole document on hearsay
8 and other grounds, specifically 225 and 226.

9 The other thing is I support, with
10 respect to the NDMAs, which involve current
11 agreements involving major record companies,
12 protecting the protection -- the specific pieces
13 of it that he has designated. That is a very
14 sensitive matter among the record companies, that
15 they don't all know the terms of the various
16 NDMAs. So that's a matter that ought to be kept
17 restricted on those three documents, which I
18 believe is 219, 220 and 221.

19 MR. BLOCH: Your Honor, if I may --

20 CHIEF JUDGE SLEDGE: Just a moment.

21 Mr. Connolly?

22 MR. CONNOLLY: I have nothing further

1 to add on the subject.

2 CHIEF JUDGE SLEDGE: Mr. Bloch?

3 MR. BLOCH: Judge Roberts, the
4 agreement you referenced is a confidentiality
5 agreement 218, the statement.

6 CHIEF JUDGE SLEDGE: All right.
7 Consideration of this motion conveniently fits
8 within a mid-morning break. We will recess
9 ten minutes.

10 (Recess.)

11 CHIEF JUDGE SLEDGE: Thank you. We
12 will return to order.

13 The motion to apply the protective
14 order is granted only for all current data and all
15 current agreements. The motion is denied for all
16 expired agreements and all data for periods of
17 time that do not include the present, and the
18 movant is directed to file an updated chart
19 tomorrow to update the two parts that are attached
20 that give the portions of the statement that are
21 redacted and the portions of the exhibits that are
22 redacted, to update that to comply with this

1 standard so that we will know exactly what
2 portions of the statement and the exhibits are
3 subject to the protective order and what portions
4 are not.

5 MR. COHEN: Your Honor, may I just ask
6 for a clarification just so that, going forward,
7 we do this in an orderly way. With respect to the
8 agreements, I fully understand the court's
9 direction. We will redesignate on the basis of
10 today's direction.

11 With respect to financial data -- and I
12 assume we have a shared interest with our friends
13 at the other table -- are we saying that if data
14 is internal non-public data for 2005 and 2006,
15 that that's not public? Because I think it is a
16 different issue, respectfully, than with respect
17 to expired agreements. Each of our clients --

18 CHIEF JUDGE SLEDGE: We are saying
19 that, that that is not current data.

20 MR. COHEN: So that all internal
21 financial data prior to -- we have no current
22 data. The most recent data that's been supplied

1 on each side is either 2005 or 2006 data.

2 CHIEF JUDGE SLEDGE: That would not be
3 current.

4 MR. COHEN: Then I guess I am
5 respectfully suggesting, Your Honor, by way of
6 reargument, if I may, that with --

7 CHIEF JUDGE SLEDGE: Thank you. We
8 have already heard that.

9 MR. COHEN: Yes, sir.

10 CHIEF JUDGE SLEDGE: And as part of the
11 decision, the presentation of the parties'
12 expectations, it must be considered that that is
13 only one-half of the equation. The other half of
14 the equation is the public's right to know. The
15 public is entitled to know and understand what
16 decisions our courts make, and the public is
17 entitled, in understanding those decisions, what
18 the facts are that support the decisions, and the
19 public is entitled, therefore, to review all facts
20 that are considered in a decision other than those
21 facts that strictly fit within the statutory
22 standards -- correction -- the common law

1 standards of what is permitted to be restricted
2 from the public.

3 MR. BLOCH: Your Honor, with regard to
4 Mr. Faxon's testimony about matters that are
5 subject to the protective order, pursuant to
6 paragraph 8 of that protective order, can I
7 request that the courtroom be closed at the time
8 that testimony is given?

9 CHIEF JUDGE SLEDGE: We will consider
10 that timely.

11 MR. BLOCH: With that, I think we will
12 hear from Mr. Faxon.
13 Whereupon,

14 ROGER FAXON,
15 called for examination by counsel, and having been
16 sworn by the Chief Judge, was examined and
17 testified as follows:

18 CHIEF JUDGE SLEDGE: Thank you. Be
19 seated.

20 DIRECT EXAMINATION

21 BY MR. BLOCH:

22 Q. Please state your name and business

1 address.

2 A. My name is Roger Faxon. And my
3 business is located at 75 9th Avenue in New York
4 City.

5 Q. By whom are you employed?

6 A. I am directly employed by EMI Music
7 Publishing and -- which is a division of EMI
8 Group, Limited.

9 Q. What is your title and position, your
10 current title?

11 A. My current title is chairman and chief
12 executive officer of EMI Music Publishing.

13 Q. Did you submit a written statement in
14 this proceeding in November 2006?

15 A. I did.

16 MR. BLOCH: With the court's
17 permission, I would like the witness to receive a
18 copy of what has been marked as Trial Exhibit 3.

19 BY MR. BLOCH:

20 Q. Mr. Faxon, if you would look at that
21 document. Can you tell us what that is, please?

22 A. Yes. This is the written statement

1 that I prepared in connection with these
2 proceedings.

3 Q. Please turn to the last page of that
4 statement and tell us if that's your signature.

5 A. Yes. That scrawl belongs to me.

6 Q. Is this the written statement that you
7 submitted in these proceedings, together with the
8 exhibits that are referenced therein?

9 A. It is.

10 MR. BLOCH: With the court's
11 permission, I move Trial Exhibit 3.

12 CHIEF JUDGE SLEDGE: Mr. Smith?

13 MR. SMITH: Your Honor, I have two
14 categories of objections to raise. One goes to
15 the various portions of the statement itself which
16 are hearsay and otherwise inadmissible. And I can
17 read those. The other goes to those two exhibits
18 I mentioned before, 225 and 226. Should I start
19 going through those, then, at this point, Your
20 Honor? The first one --

21 CHIEF JUDGE SLEDGE: I don't want to
22 encourage you.

1 (Laughter.)

2 MR. SMITH: With respect to the text of
3 the document, what you see -- this is the
4 statement. What you see here is a variety of
5 places in which Mr. Faxon is basically reporting
6 what he read in the newspaper and -- or in a
7 magazine or in some analyst report somewhere.

8 They have previously included the
9 newspaper articles and the magazine articles and
10 the analyst reports as exhibits that were proposed
11 to be admitted in evidence. We learned recently
12 that they don't intend to offer those hearsay
13 documents into evidence, but we have now
14 essentially the relic of that, which is his
15 paraphrase of these various articles and reports
16 and clippings of various sorts.

17 The first example is paragraph 32 of
18 his testimony, all of which is him paraphrasing an
19 article in Billboard Magazine, which was
20 previously Exhibit 7 but which they're now not
21 offering into evidence.

22 A similar problem arises with respect

1 to paragraph 33 in a different article.

2 Paragraph 33 was to be based on Exhibit 8, but he
3 is not offering that in evidence either. So we
4 have, instead, him telling us what the article
5 would say.

6 CHIEF JUDGE SLEDGE: All right. Any
7 response to the objections to paragraphs 32 and
8 33?

9 MR. BLOCH: Your Honor, we're not
10 offering those exhibits because we don't think
11 they're necessary at the moment for Mr. Faxon's
12 testimony. We think his written statement,
13 though, and his summary of those, of which he has
14 some personal knowledge as well, are perfectly
15 appropriate to remain in the statement.

16 CHIEF JUDGE SLEDGE: All right. The
17 objections to paragraphs 32 and 33 are granted.
18 Sustained.

19 MR. SMITH: Your Honor, my next
20 objection goes to paragraph 35 where we have
21 estimates of the future growth of the digital
22 marketplace industry-wide, global, wholesale

1 revenues from digital distribution, which is
2 attributed to what used to be Exhibit 9 -- no
3 longer being offered -- which is apparently some
4 kind of estimates which come from Morgan Stanley
5 about the market, again, based on a hearsay
6 document which is no longer being presented to the
7 court.

8 MR. BLOCH: May I respond to that?
9 Your Honor, Mr. Faxon will testify that in all of
10 his executive capacities, he routinely, as a
11 matter of course, with regard to his daily
12 business, stays on top of activity that is going
13 on in the market. He reads analyst reports. He
14 reads reports like the Morgan Stanley report
15 projecting forecasts and other documents of that
16 sort.

17 It is a standard fare for his duties
18 and responsibilities as an executive to stay in
19 touch with what's going on in that market. He
20 uses that together with other inputs in making
21 business decisions and staying informed in order
22 to evaluate what's going on and form a strategy

1 and making decisions within the company.

2 I think this is perfectly regular
3 activity, and this kind of report and his comments
4 about it in his statement are perfectly compatible
5 with the rules of evidence. And he will testify
6 as to the bases upon which he makes his business
7 decisions and the kinds of information and inputs
8 that he uses. The fact that it's not being
9 offered into evidence doesn't mean that it is
10 inadmissible in this statement. We just chose not
11 to use it as part of his testimony.

12 CHIEF JUDGE SLEDGE: I would expect
13 that when there's -- that the rules of evidence
14 permit a summary of an exhibit, but upon
15 objection, that the exhibit must be admitted
16 before the summary is admitted. Is that not
17 correct?

18 MR. BLOCH: Yes. The underlying --
19 well, the underlying documents upon which a
20 summary is based must be made available to the
21 other side, and they must be authenticated, yes.

22 CHIEF JUDGE SLEDGE: So why doesn't

1 that support the objection?

2 MR. BLOCH: Well, ordinary business
3 reports are public records, and analyst reports
4 are used all the time by business executives in
5 evaluating information to make business decisions,
6 aside from other inputs.

7 CHIEF JUDGE SLEDGE: That's not the
8 basis of the objection. The objection, as I
9 understand it, is not that he read this and does
10 that as part of his daily work. The objection is
11 that he is giving information from an exhibit
12 that's not being offered.

13 MR. BLOCH: Well, I think he is able to
14 express his opinions in paragraph 34 -- is it
15 paragraph 33?

16 CHIEF JUDGE SLEDGE: Paragraph 35 is
17 what we are on.

18 MR. BLOCH: The estimates that he's
19 giving here on Exhibit 9 were not only from EMI
20 Music Publishing, but also Morgan Stanley. So are
21 you objecting to the Morgan Stanley piece of it or
22 are you objecting to the EMI piece of it?

1 CHIEF JUDGE SLEDGE: The objection is
2 that the supporting document for this information
3 is not being offered.

4 MR. SMITH: And that the whole
5 paragraph is hearsay in any event, Your Honor.

6 MR. BLOCH: Well, to the extent that it
7 relies on EMI Music Publishing data --

8 CHIEF JUDGE SLEDGE: You're wrong on
9 that, Mr. Smith. The first sentence is not
10 hearsay.

11 MR. SMITH: I stand corrected, Your
12 Honor. The rest of the paragraph.

13 MR. BLOCH: Excuse me, Your Honor. May
14 I approach?

15 JUDGE WISNIEWSKI: What's your basis
16 for stating that, Mr. Smith?

17 MR. SMITH: Reporting estimates of
18 global wholesale revenues that -- was done by
19 somebody else, which he then reads and tells the
20 court about. I can't cross-examine the person who
21 did the estimates because it's not Mr. Faxon.

22 JUDGE WISNIEWSKI: And who is it that

1 did these estimate?

2 MR. SMITH: It's some unexplained
3 combination of somebody else at EMI Music
4 Publishing and somebody at Morgan Stanley. If we
5 see Exhibit 9, it doesn't actually tell you what
6 numbers came from which of those places. But in
7 no case is it apparently Mr. Faxon.

8 MR. BLOCH: I would also point out to
9 the court, if I might, under 351.1 that this court
10 may consider hearsay evidence to the extent that
11 it is deemed appropriate and useful by the court.

12 CHIEF JUDGE SLEDGE: Go ahead,
13 Mr. Smith.

14 MR. SMITH: Your Honor, my next
15 objection relates to paragraph 50, starting with
16 the second sentence, continuing through the third
17 sentence and through the citation to the Time
18 Magazine article. We have here assertions about
19 what kind of profits are made by the Apple
20 Corporation based on a Time Magazine article.

21 CHIEF JUDGE SLEDGE: Mr. Bloch?

22 MR. BLOCH: Again, Your Honor, only one

1 segment of that refers to the article, which is a
2 public article, and I would refer the court back
3 again to rule 351.10. This is in the public
4 domain, and the court can take notice of this and
5 consider it in the course of its deliberations.

6 CHIEF JUDGE SLEDGE: Mr. Connolly?

7 MR. CONNOLLY: Your Honor, I've done my
8 best to remain silent today, but I wanted to add
9 my voice to an objection to this particular
10 paragraph that's in addition to Mr. Smith, which
11 is the middle sentence there is argumentative.
12 And if a witness had testified to this in federal
13 court and suggested that Apple artificially holds
14 down the price --

15 CHIEF JUDGE SLEDGE: Which federal
16 court are you referring to?

17 MR. CONNOLLY: Your Honor, I'm just
18 saying if it was live testimony rather than
19 written testimony, that the motion would be to
20 strike the testimony as argumentative, but of
21 course we don't have that opportunity when it's
22 written testimony. But that clearly is an

1 argumentative --

2 CHIEF JUDGE SLEDGE: Why don't you have
3 that opportunity?

4 MR. CONNOLLY: Well, I can take the
5 opportunity now, Your Honor. I'm sorry. The
6 point is that in addition to being based on
7 hearsay, it is also argumentative and suggests
8 another reason that it should be struck.

9 CHIEF JUDGE SLEDGE: The objection to
10 paragraph 50 is overruled.

11 MR. SMITH: Your Honor, my next
12 objection is to paragraph 51 which reports various
13 information about a transaction between Microsoft
14 and Universal Music, apparently based on an
15 article from the New York Times.

16 CHIEF JUDGE SLEDGE: Is that it?

17 MR. SMITH: It's a hearsay objection to
18 that, Your Honor.

19 CHIEF JUDGE SLEDGE: Objection to 51 is
20 overruled.

21 MR. SMITH: The next objection, Your
22 Honor, is to 52 in which we have information here

1 about YouTube's revenues -- Google's acquisition
2 of YouTube as to which there is no information at
3 all about where Mr. Faxon obtained the knowledge
4 of that transaction.

5 CHIEF JUDGE SLEDGE: Objection to 52 is
6 overruled.

7 MR. SMITH: The final matter, Your
8 Honor, involves both testimony starting on page 40
9 and continuing on to page 41 and the related
10 exhibits, which are CO 225 and 226. This involves
11 two reports that were generated at EMI detailing
12 various information about the alleged shortfall in
13 royalty payments made to EMI Music Publishing by
14 record companies. The two -- the two exhibits are
15 worth looking at. If you would look at them in
16 your binders, I would appreciate it.

17 The first one, 225, contains a long
18 series of pages making various accusations of
19 nonpayment and other problems with the payment of
20 royalties from a whole variety of companies
21 involving a whole variety of agreements.
22 Clearly -- essentially what he is doing here is

1 having somebody else provide a lot of testimony on
2 a document that somebody else put together, and so
3 I think that it's very difficult to cross-examine
4 somebody on somebody else's testimony. It's
5 hearsay in that sense.

6 Now, with respect to 226, I have --

7 CHIEF JUDGE SLEDGE: I'm sorry.

8 MR. SMITH: I'm sorry. We will take
9 them one at a time.

10 CHIEF JUDGE SLEDGE: Is all of this in
11 the information or not? I mean, is this
12 information contained in the agreement or not?

13 MR. SMITH: This is not summaries of
14 the agreement, Your Honor. This is summaries of
15 various aspects of the administration of various
16 agreements, which is to say what kind of report
17 was laid, what tracking report was laid, when
18 money was received, when it should have been
19 received, a whole series of factual assertions
20 about problems that justify their proposed late
21 fees and other terms.

22 MR. BLOCH: Your Honor, may I comment?

1 CHIEF JUDGE SLEDGE: Is the answer to
2 my question it is not in the agreement?

3 MR. SMITH: The first column is the
4 agreement, Your Honor. It's the other columns
5 which contain various assertions of fact about
6 problems in the administration of the agreements.

7 CHIEF JUDGE SLEDGE: And, therefore, it
8 is not in the agreement?

9 MR. SMITH: Correct.

10 CHIEF JUDGE SLEDGE: Thank you.

11 JUDGE ROBERTS: So what you're saying,
12 Mr. Smith, is Mr. Faxon is not capable of
13 answering questions with respect to reporting
14 issues, tracking issues, additional proposed
15 enhancements?

16 MR. SMITH: My concern is if I ask him
17 a question about this document, he is going to
18 say, well, I just had somebody go out and get me
19 this information. I didn't compile this
20 information. I don't have any personal knowledge
21 about this.

22 So how can I cross-examine him about

1 that?

2 MR. BLOCH: May I respond, Your Honor?

3 CHIEF JUDGE SLEDGE: Yes, sir.

4 MR. BLOCH: Exhibits 225 and 226 are
5 internally --

6 CHIEF JUDGE SLEDGE: We're doing 225
7 now.

8 MR. BLOCH: All right. 225 is an
9 internal business record that was made in the
10 regular course of EMI's business activity,
11 specifically the monitoring of the NDMA
12 agreements. There were agreements with Sony BMG.
13 There was an agreement with Universal and an
14 agreement with Warner. And internally within
15 EMI -- Mr. Faxon will testify that EMI people were
16 involved with those agreements in the regular
17 course of their business, kept track of the
18 activity going on.

19 And this document will show, among
20 other things, that the companies were not making
21 timely payments of royalties pursuant to those
22 agreements. As the executive of the company, he

1 received such reports about that activity which
2 are reflected in these documents. So he can
3 authenticate the document as a business record and
4 testify about them.

5 CHIEF JUDGE SLEDGE: What rule was
6 that?

7 MR. BLOCH: 8036.

8 CHIEF JUDGE SLEDGE: Mr. Smith,
9 anything further?

10 MR. SMITH: My concern about that
11 argument, Your Honor, is that there isn't any
12 testimony in the -- written direct testimony that
13 this is a business record, that it's prepared in
14 the ordinary course of business. It's dated just
15 a few weeks before the testimony was filed, and it
16 would certainly appear to me that this was
17 something prepared for purposes of this
18 proceeding, which makes it hearsay and not a
19 business record.

20 And certainly the fact that Mr. Faxon
21 can say something in this court about an exhibit
22 is a violation of the rules. What the rules say

1 is you have to refer to it in your direct
2 testimony in order to substantiate the exhibits
3 that you're sponsoring.

4 CHIEF JUDGE SLEDGE: All right. Go on
5 to Exhibit 226.

6 MR. SMITH: There is an additional --
7 226 is another analysis of royalty nonpayments.
8 It has an additional problem that it is
9 essentially an analysis or a calculation. They --
10 the person who authored this document,
11 Mr. McVeedy, apparently applied some methodology
12 to come up with an estimate of what they should
13 have been paid using some source of information
14 about sales of downloads, and then compared that
15 estimate, which we don't know how he did it, to
16 what they had actually been paid.

17 So in addition to having similar
18 problems of hearsay, this is a violation, we would
19 argue, of section 351.10(e) which says -- this is
20 the regulation. It says, Introduction of studies
21 and analyses. If studies or analyses are offered
22 into evidence, they should state fully the study

1 plan, the principles and methods underlying the
2 study, the relevant assumptions, where the facts
3 came from, et cetera.

4 We have a document that asserts that
5 there's millions of dollars that weren't paid that
6 should have been paid based on some expectations
7 derived from some data which we don't know what it
8 was.

9 MR. BLOCH: May I respond? Once again,
10 Your Honor, just to be clear, these documents are
11 both referenced, 225 and 226, in paragraphs 76 and
12 77 in Mr. Faxon's statement, so he has
13 specifically provided testimony about them.

14 With regard to 226, this is also a
15 business record admissible for the same reason
16 under 8036. It's made in the regular course of
17 business. It was directed to Mr. Faxon and
18 others. It does concern a shortfall and failure
19 to pay, and Mr. Faxon can authenticate this
20 document and will tell the court that this is
21 prepared on a quarterly basis in the regular
22 course of EMI's business.

1 And it also seems to me that these
2 objections -- cross-examination is perfectly
3 appropriate on them if there are these issues that
4 Mr. Smith is concerned about.

5 CHIEF JUDGE SLEDGE: All right.
6 Mr. Smith, please take the podium, and ask any
7 voir dire that you wish on these two exhibits.

8 VOIR DIRE

9 BY MR. SMITH:

10 Q. Good morning, Mr. Faxon. Paul Smith
11 for the RIAA. Could I ask you to turn to
12 Exhibit 226 in your binder there?

13 A. 226?

14 Q. Yes, sir.

15 A. Yes.

16 Q. And I wonder if you could tell us what
17 a shortfall analysis is.

18 A. Shortfall analysis is as you explained
19 it a moment ago. It is the -- it is a -- what we
20 would call a tracking report to determine how much
21 monies that should have been paid to us were not
22 paid to us on behalf of our songwriters.

1 Q. And are you personally familiar with
2 the methodology that was used to come up with the
3 shortfall, the expectation?

4 A. Yes. In fact, I designed it. So your
5 assertion earlier that I would not be able to
6 testify to it is not really valid since I designed
7 the methodology.

8 Q. And is it true that document 226 is
9 prepared in the ordinary course of business for
10 EMI?

11 A. It is. If you would like an update of
12 it, I have one in my bag. It comes out quarterly.

13 Q. Is the same true with respect to
14 Exhibit 225?

15 A. No. 225 was put together for -- on a
16 different basis. It was to allow us to structure
17 a tracking process for the NDMAs which, as you
18 know, are fairly complex agreements, and that they
19 required -- and we did not believe that we were
20 being reported to appropriately. So we had the
21 staff -- I had the staff go and analyze exactly
22 what should the process be to make an estimate of

1 what the shortfalls related to that we were
2 experiencing as of that date, and to try and set
3 out how to then proceed to improve the collections
4 that were required under the agreements.

5 Q. And do you have personal knowledge of
6 how they went about gathering this information?

7 A. Yes, I do.

8 Q. How do you have that knowledge?

9 A. Well, I'm a pretty hands-on executive,
10 so -- especially when we're dealing with
11 documents -- with agreements as important as these
12 that set the precedent for the way in which we
13 will collect and manage the affairs of our
14 songwriters going forward in the digital age. So
15 I'm very much involved in understanding and
16 monitoring how it works.

17 Q. And it's your testimony that 225 was
18 not prepared for purposes of presentation in this
19 court?

20 A. Yes, that is absolutely my testimony.
21 It was in the ordinary course. With contracts as
22 important as these, you need to build an

1 appropriate way of monitoring them and tracking
2 the receipts.

3 MR. SMITH: Your Honor, it's still my
4 position that that's the testimony that should
5 have been in the written direct statement. But if
6 you're going to -- have apparently allowed him to
7 supplement that by answering here, I will withdraw
8 my objection. I think that establishes a basis if
9 you think it's timely.

10 CHIEF JUDGE SLEDGE: Is that for both
11 225 and 226?

12 MR. SMITH: Yes, sir.

13 MR. BLOCH: Your Honor, that is...

14 CHIEF JUDGE SLEDGE: All right. That
15 leaves, I believe, only the objection to
16 paragraph 35.

17 With the provision in paragraph 35 that
18 the information is according to estimates from
19 EMI, the objection to 35 is overruled. And that
20 then leaves us with the results of the motion in
21 limine, and the exhibit is admitted with the
22 rulings on the objections -- subject to the

1 rulings on the objections.

2 MR. BLOCH: May I proceed, Your Honor?

3 CHIEF JUDGE SLEDGE: Yes, sir.

4 FURTHER DIRECT EXAMINATION

5 BY MR. SMITH:

6 Q. Mr. Faxon, let's talk a little bit
7 about your background and experience. Can you
8 please describe your education after high school,
9 please?

10 A. I attended Johns Hopkins University and
11 received a degree in political economy and
12 international relations.

13 Q. After graduating from college, what did
14 you do?

15 A. I worked in a family business for
16 several years, and then I went into government
17 service. Most especially, I was among the
18 earliest staff members of the Congressional Budget
19 Office where I was responsible for budget analysis
20 with respect to government finance and housing and
21 community development. I then proceeded to become
22 chief of the professional staff of the

1 Subcommittee on Housing and Urban Development in
2 the U.S. House of Representatives.

3 Q. After your government service, did you
4 join the private sector?

5 A. I did. I made a left turn, I suppose.
6 I became chief operating officer of Lucasfilm
7 which is George Lucas' company, where I ran all of
8 his business and -- including the development of
9 what became Pixar and what -- Industrial Light &
10 Magic and a range of other businesses that are
11 under his --

12 CHIEF JUDGE SLEDGE: Mr. Bloch, you
13 need to move your lectern back to where it was.

14 BY MR. BLOCH:

15 Q. If you would, Mr. Faxon, keep your
16 voice up.

17 A. You want me to speak up a little bit?

18 Q. Just keep your voice up.

19 A. Usually people want me to quiet down.

20 CHIEF JUDGE SLEDGE: Just imagine,
21 Mr. Bloch, if you're having trouble hearing, the
22 folks in the back of the room are probably not

1 able to hear anything.

2 THE WITNESS: So I -- anyway, I worked
3 for George Lucas for a number of years. I then
4 went and produced motion pictures and television
5 in partnership with others, and then subsequently
6 became the senior executive vice president of
7 Columbia Pictures Industries, in charge of the
8 motion picture division of that business. And
9 then, when it was acquired by Sony, remained in
10 that position.

11 BY MR. BLOCH:

12 Q. Did you hold any other private industry
13 position before you came to EMI?

14 A. Yes. I became -- after a short stint
15 in New York to learn the business, I became
16 managing director, which is the equivalent of
17 chief executive, of EMI -- I only wish -- of
18 Sotheby's in Europe, based in London.

19 Q. When did you first work in the music
20 industry?

21 A. In 1994 I joined EMI in a role that put
22 me in charge of business development -- that's

1 investments on behalf of the company -- and
2 strategy and planning. And in that capacity I was
3 responsible for the planning and budgeting process
4 for the entirety of what was then called EMI Music
5 which encompassed what EMI Group is today, the
6 music publishing business and the recorded music
7 business.

8 Q. In total, how many years have you
9 worked for EMI?

10 A. As of April, it will be 14 years.

11 Q. And can you go into a little more
12 detail about what your duties and responsibilities
13 were -- I think you said you were senior vice
14 president of worldwide business development.

15 A. Right. My responsibilities were in the
16 day-to-day management of the company, to
17 effectively be the right-hand man of the chief
18 executive. I was responsible for developing
19 business plans at the detail -- at the country,
20 and in the United States at the label level, in
21 the recorded music business and in the publishing
22 business, again, on a national basis. And in the

1 United States, clearly it's a unified business.

2 I was also responsible for the
3 development of long-term strategic plans for the
4 business as a whole, and in that regard,
5 obviously, I had to be cognizant of market trends,
6 competitive issues and performance and the like.
7 So on the budgeting side, I was responsible for
8 the detailed budget of the business.

9 Q. Did you review documents in connection
10 with EMI's music business?

11 A. Most definitely. It was where most of
12 the effort was put because it was clearly the
13 business that provided the greatest upside
14 potential for the business.

15 Q. Did you review documents concerning
16 EMI's music publishing business?

17 A. I did, yes.

18 Q. Did you review any data forecast or
19 other industry-type information?

20 A. All the time. I was -- I gathered data
21 from a wide range of sources to -- again, to
22 understand the context in which the business was

1 operating and its competitive setting. And that
2 involved publicly available data as well as data
3 that we specifically commissioned work to gather.

4 Q. What other positions have you held in
5 EMI?

6 A. I moved from the position we just
7 talked about to being chief financial officer --
8 executive vice president chief financial officer
9 of EMI Music Publishing worldwide. And in that
10 role I was -- I had operation oversight over the
11 Latin American and Asian businesses and
12 operational responsibility on the administrative
13 side, which would mean licensing -- many of the
14 things we're going to talk about today --
15 royalties, accounting, and the like, and for the
16 worldwide business and across all divisions.

17 And I was pretty much intimately
18 involved in the -- not pretty much. I was in that
19 role, responsible for the strategic planning and
20 financial performance of business.

21 Q. Did you have any dealings or oversight
22 involving EMI music?

1 A. Not directly -- not in that role. But
2 during that time, which coincided with a proposed
3 merger between Warner Music Group and EMI, I was
4 involved in the development of the transaction,
5 and then subsequently took on the role -- took on
6 the responsibility for guiding the regulatory
7 review -- responses to regulatory reviews around
8 the world.

9 In that role, that meant that I had to
10 develop, for those regulatory filings, a massive
11 amount of data and information related to the
12 performance of the business, its competitive
13 setting, marketplace and the like. And at my
14 direction, we commissioned a range of studies in
15 support of our applications.

16 So at a very detailed level, down to
17 pricing decisions, terms of trade in each country,
18 in each label, across the entirety of the record
19 side of the business, and similarly for the
20 publishing side of the business.

21 Q. What position did you hold next?

22 A. I then was appointed chief financial

1 officer of EMI Group, the parent company, which by
2 that time was an independent company. It
3 previously, when I joined in '94, was part of a
4 larger conglomerate, a company called Foreign EMI.
5 It then became the EMI Group, and during that
6 period it had, in part, spun off the HMV record
7 store business, though it remained a significant
8 shareholder.

9 So that business I became chief
10 financial officer of and was involved -- at that
11 time, the leadership of the recorded music part of
12 the business was changed and someone whose name
13 may appear in these proceeding, Alain Levy and
14 David Munns, were appointed as the -- to lead that
15 division. And in that connection, I worked
16 intimately with them to develop a reorganization
17 plan for the recorded music business in order to
18 adjust its cost base and to refocus its business.

19 Q. Did you review documents in connection
20 with both EMI Music and EMI Music Publishing in
21 that capacity?

22 A. Most definitely. I was responsible

1 worldwide for the entire financial performance of
2 the business in my role. And as a board member, I
3 was responsible for the operating -- and as a
4 member of the executive committee, I was
5 responsible, with my colleagues, for the
6 operational performance of the business.

7 Q. What position did you hold next, sir?

8 A. Then I was asked to ultimately take on
9 the position that I am now in through a
10 transitional plan where I first became president
11 and chief operating officer of EMI Music
12 Publishing. In that role, I -- again, I took on
13 responsibility for running the rest of the world,
14 if you will, all the territories outside of North
15 America, and the underlying operational
16 business -- that's, again, licensing, royalties,
17 accounting and so on.

18 And then I subsequently became co-chief
19 executive officer with my predecessor, and we
20 shared responsibility for the business equally,
21 across all aspects of the business. And I
22 rejoined at that point the board of directors of

1 EMI Group.

2 Q. And the transition period, when did
3 that begin?

4 A. It began in 1995 -- 2005, sorry.

5 Q. And you became chairman --

6 A. Missed a decade there.

7 Q. -- chairman and CEO --

8 A. This last year.

9 Q. Okay. And did your duties and
10 responsibilities change over that period of time
11 or did they remain basically the same?

12 A. They evolved into having a broader set
13 of authority over the business, but I had pretty
14 much the same sort of involvement in the business.

15 Q. In those capacities, did you have
16 occasion to see business documents relating to EMI
17 Music?

18 A. I did, in my role as a director, but
19 not in my role as chief executive or in the
20 previous roles of EMI Music Publishing. So as a
21 director, yes, monthly financial reports, monthly
22 executive committee meetings, and certainly --

1 eight times a year we had board meetings.

2 Q. Mr. Faxon, did you serve on any boards
3 or participate in trade associations relating to
4 the music industry?

5 A. Yes, I serve on three boards. I serve
6 on the National Music Publishers' Association
7 board. I also serve on the ASCAP board, which is
8 a performing -- which is one of the performing
9 rights societies here. And on a range of
10 committees on both of those.

11 And I also am a board member of a
12 business called Music Choice. It's a partnership,
13 and its business -- many of you probably are
14 familiar with on your cable systems. You turn it
15 on and music plays on a range of channels. It's a
16 business that is not only involved in providing
17 music services in the cable world, but it has
18 grown to providing music services in online and
19 mobile -- I guess mobile platforms as well. And I
20 serve on their -- on its compensation committee
21 and have done so for many years.

22 It was my very first investment when I

1 took on business development for EMI.

2 Q. And on ASCAP, what is your role as a
3 board member?

4 A. As I -- I chair the long-term strategy
5 committee, planning and strategy committee. And
6 as of this morning I see that I have been
7 appointed chairman of the financial -- finance
8 committees.

9 Q. Can --

10 A. Just to be clear, I did not run for
11 such a position.

12 Q. How does EMI Music Publishing rank in
13 the music publishing industry today?

14 A. Well, I heard you earlier -- and I have
15 to correct you that we're the largest music
16 publisher in the world. I think that mantle has
17 passed to Universal with the acquisition of BMG.
18 But I would assert that we're the best music
19 publisher in the world, and I'm under oath, so it
20 has to be true.

21 Q. How large is EMI Music Publishing
22 compared to other music publishers?

1 A. Well, it's only slightly smaller than I
2 understand -- though I haven't seen published
3 figures -- that Universal is. But it tends to
4 be -- it is certainly a large music publisher.
5 It's -- the next biggest after us would be
6 Warner/Chappell, and I think that's about
7 two-thirds of our size.

8 Q. And what are EMI Music Publishing's
9 revenues?

10 A. Its revenues in dollars would be the
11 equivalent of about \$800 million of turnover a
12 year.

13 Q. And the U.S. portion of that?

14 A. Just under half -- just around -- so it
15 would be around 300, 350 million. It does depend,
16 year on, on the translation of currency because a
17 reasonable portion of the revenues that we gain
18 under U.S. copyrights come from abroad.

19 Q. How many songs does EMI Music
20 Publishing represent in EMI Music Publishing's
21 catalog?

22 A. I like to talk about them as

1 compositions because they -- song denotes a
2 certain structure of music. But the compositions
3 that we represent are about 1.3 million worldwide.

4 Q. How many songwriters does EMI Music
5 Publishing represent?

6 A. The -- the way to -- we represent
7 royaltiers, in other words, people who are entitled
8 to be -- to receive revenues from the exploitation
9 of their work, so about 46,000 of them. And some
10 of -- most of those are songwriters, but many of
11 those could be heirs or assignees.

12 Q. How many active songwriters does EMI
13 Music Publishing represent?

14 A. About 700.

15 Q. Can you identify for the court some of
16 the songwriters that EMI Music Publishing has
17 represented in the past or currently represents?

18 A. Well, I think the -- the statement I
19 think itself does a pretty good job of giving you
20 a sense of the breadth of who we represent. And
21 we represent songwriters who have been active in
22 the past, Carole King, Stevie Wonder, who

1 obviously is still active. We represent current
2 songwriters of well -- well-known. Alicia Keys
3 this last week led the charts in -- with her
4 latest album. James Blunt. And a vast array of
5 songwriters. Many of the songwriters that we
6 represent are names that you would not recognize,
7 and they toil in the background. But they're no
8 less talented and important.

9 Q. Does EMI Music Publishing also
10 represent writer-producers?

11 A. Yes.

12 Q. What are writer-producers?

13 A. Well, a writer-producer -- well, let's
14 start with what a producer is. A producer is
15 someone who brings together the elements to create
16 a great recording. So they bring together the
17 song, they bring together the -- the people who
18 play on it, the performers, and they use their
19 skill as songwriters to knit those together in the
20 best possible package. And that's -- and that has
21 become a skill of some importance in -- as music
22 has developed.

1 Q. Can you give the court a couple of
2 examples of writer-producers?

3 A. Well, I think the -- this is a -- this
4 is a skill that's -- the greatest prevalence is in
5 the urban world. So Jimmy Jam and Terry Lewis,
6 P. Diddy, Jermaine Dupri, and so on. These are
7 all hugely successful producer-songwriters.

8 Q. And just to sort of round out the
9 repertoire, if we can, can you identify a few of
10 the more well-known songs that EMI has kept?

11 A. Every Breath You Take; New York, New
12 York; Somewhere Over the Rainbow; I Heard It
13 Through the Grapevine; Ain't No Mountain High
14 Enough.

15 This is a -- this is a very dangerous
16 thing to get me to start to do.

17 Q. All right. Then I will stop.

18 Based on your 14 years' experience with
19 EMI, have you gained an understanding of the music
20 publisher's role in making music available to the
21 public?

22 A. Well, if I didn't, I don't think I

1 would hold my job. So, yes, I do think I have an
2 understanding of what our role is.

3 Q. And what is that role?

4 A. Well, first and foremost, our role is
5 to -- we're a service business. Songwriters come
6 to us to obtain a service. They want us to do
7 something for them. And what are those things?
8 Well, first and foremost, they want us to help
9 them develop their skill, their talent as a --
10 help them develop their talent as songwriters.
11 And we do that in a wide variety of ways, but
12 simply put, we have a staff that works with them,
13 helps them understand how better to improve their
14 music.

15 Sometimes that involves creating
16 collaborations with other songwriters, whether
17 they're signed to us or not. And -- and it is an
18 ongoing process.

19 So the next thing that our
20 responsibility is is to -- service we offer is to
21 try and make their music widely available and
22 understood, to create demand for it, if you will.

1 And there's, again, a wide variety of ways to do
2 that. Today we're talking about mechanical rights
3 where music is recorded, and obviously one of the
4 most important things for us to do is to get our
5 songs -- the songs we represent -- recorded. It
6 allows for a broad dissemination of that music.
7 But we also work to get it played in clubs and
8 into the repertoire of orchestras and bands around
9 the world.

10 Once we have done that, it's our job to
11 be sure that we have commercialized it, and we go
12 and collect money. We actually license and create
13 a legitimate world where we are obtaining revenue
14 for them. And that means that we have to be sure
15 that we are getting a fair price for the use
16 that's been contracted for.

17 And, finally, our role is to assure
18 that those rights are protected. And there are
19 two -- and when I say "those rights," there are
20 two sorts of roles here.

21 We will hear a lot in this proceeding
22 about piracy, and piracy is a hugely -- that is

1 where somebody is stealing the value of the music
2 that our songwriters are creating. And we act
3 pretty decisively against them. Our goal
4 generally, though, is not to go out and be in
5 lawsuits. It is to try and turn people who are
6 being -- who are using our music without
7 authority, turn them into being legitimate
8 outlets. And the -- so that's one part of this
9 protecting role.

10 The other is that these rights -- these
11 songs are creations. They are out of the soul of
12 the songwriters we represent, and so we don't want
13 them to be misused, to be -- the creative
14 integrity of them. So we act to protect that.

15 And those are the broad top -- elements
16 of what our job is. And if we do it well,
17 songwriters come to us and -- and we have a
18 business. If we don't do it so well, we don't
19 have such a good business.

20 Q. If you would, please turn to page 4 of
21 your statement, paragraph 9. Do you see that?

22 A. Yes.

1 Q. In that paragraph you refer to the
2 intrinsic value of a song. Do you see that?

3 A. Yes.

4 Q. What do you mean?

5 A. Well, I think -- in my day-to-day
6 business, I don't license anything for zero unless
7 I believe it's going to draw value. And why don't
8 I do it for zero? Because the song itself has an
9 intrinsic value. There is a base level of value
10 that is -- by the nature of it as a composition.

11 To believe otherwise is to believe
12 there is no -- you know, that the only thing in
13 the world is the value -- is -- is what somebody
14 will pay for it. No. It's what you believe it's
15 worth is one part. And then that's married to
16 what people will pay for it.

17 And at the end of the day, we believe
18 and I believe -- and I conduct my business so --
19 as to be sure that people recognize that each
20 composition we represent has a value, and that
21 value is not zero.

22 Q. Do musical compositions have an

1 intrinsic value in different contexts?

2 A. Yes. I think -- if you start with --
3 if you start with the principle I start with,
4 which is that it has a value, now you have to say,
5 how do you measure that value above a base level?

6 Well, you look at the contribution that
7 that work has to the economic viability of the --
8 of the output that it's associated with, the work,
9 if you will. And the greater the contribution,
10 the greater the share should be.

11 And by the way, that is exactly the way
12 we license our works.

13 Q. We will come back to that. You
14 identified a number of services and roles that EMI
15 Music Publishing provides. I would like to
16 explore them with you in a little more detail.
17 First, one of the things you referred to is the
18 fact that EMI Music Publishing discovers or
19 develops new songwriters.

20 A. Yes.

21 Q. How does EMI Music Publishing do that?

22 A. Well, we have a staff that's dedicated

1 to that, and the -- and that staff searches out
2 great songwriters. And that means that -- I think
3 we need to differentiate. Again, these
4 proceedings will inevitably sort of cloud the
5 difference between recording artist and a -- and a
6 songwriter. There is a different skill.
7 Sometimes they come in the same package. Billy
8 Joel is a great example of somebody who comes in
9 the same package. He's a fantastic songwriter and
10 just a fabulous performer.

11 Sometimes they don't, and quite often
12 they don't. You know, Judy Garland did not write
13 Somewhere Over the Rainbow, and I don't think
14 anybody in this room thinks that she did. You
15 know, Harold Arlen did and, trust me, he was a
16 hugely talented man. So first and foremost,
17 finding somebody who has the capability of writing
18 is a different skill than finding somebody who is
19 a performer. Sometimes they overlap, and that's a
20 great thing. It's a marvelous world, because what
21 makes great music is a great song brilliantly
22 performed.

1 The nice thing about songs is that it
2 can be poorly performed, and then you can take it
3 to somebody else who brilliantly performs it.
4 And -- so our job is to go out and find those.
5 And we do that in a whole variety of ways.

6 In today's world, the internet is a
7 very good way to go out and reach further into the
8 populace to find people who have the talent. But
9 most often they don't actually have the developed
10 talent that will allow a commercial -- them to be
11 commercially successful. They need to be a
12 professional songwriter. That means they have to
13 dedicate the time and effort.

14 I gave a little talk not too long ago
15 to my daughter's school about what the difference
16 between being a professional songwriter is and
17 what -- being an amateur. And they had just done
18 a school play. I said, well, you guys had fun.
19 You really enjoyed it. You think you're good
20 actors. Do you think that you could play on
21 Broadway? And the answer is of course they
22 couldn't. And they answered correctly, thank you.

1 And so it's a different -- somebody who
2 works as a songwriter and develops their talent so
3 that it becomes a commercial -- you have a
4 commercial outcome is somebody who dedicates
5 themselves as a professional. Amateurs are all
6 around, and sometimes, on rare occasions, they
7 create the one-off song, but that's really not the
8 reality. The reality is you have to dedicate
9 yourself to it.

10 Q. Let me ask you this. Has --

11 CHIEF JUDGE SLEDGE: Do I understand
12 you to use the word "professional" in a loose way,
13 to define people that are employed and make an
14 income from that employment?

15 THE WITNESS: Yes. Yes. That's
16 exactly -- the point is that you use that skill to
17 create a flow of income to support yourself so you
18 can do it mostly full-time.

19 CHIEF JUDGE SLEDGE: It has nothing to
20 do with the standard definition of professional?

21 THE WITNESS: I'm not sure that I could
22 give you the standard definition of professional

1 other than just to simply convey what I meant,
2 which is that -- somebody who can make a living at
3 it, who spends most of their time -- let me put it
4 that way -- spends most of their time dedicated to
5 developing music that has a commercial -- has the
6 ability to be commercially exploited.

7 BY MR. BLOCH:

8 Q. Has EMI Music Publishing had any
9 notable successes in discovering talent in the
10 last ten years?

11 A. Well -- many, many, and I think the --
12 but I will stick to the ones that are related --
13 that are in the -- in our -- in my statement.
14 Alicia Keys and James Blunt are interesting
15 examples because I think they're illustrative of
16 what it is to become a -- in my words, a
17 professional songwriter. Alicia was a very young,
18 green songwriter and performer, largely a
19 songwriter at the time. She was 16 years old, and
20 she was found, if you will, discovered by Jody
21 Gerson who at the time worked for EMI Music
22 Publishing.

1 Over the next -- over the course of the
2 next five years, we put her together with other
3 songwriters to learn her craft, to develop her
4 skill, and we provided her with financial support
5 in the form of advances to help her be able to
6 spend the time to do that. And why did we do
7 that? We believed in her talent. And we invested
8 \$500,000 in advances to the point at which she put
9 out a hugely successful record.

10 Now, it was the bumpy road. She was --
11 we helped her get signed to Sony -- a Sony music
12 label. And, unfortunately, her sponsor there was
13 let go and, therefore, she was dropped. But with
14 great -- it was serendipitous that that happened
15 because then the great creative marriage was made
16 between Clive Davis and J Records and Alicia, and
17 that has been a fantastic outcome.

18 But she is a person who is consistently
19 trying to improve her craft. And so we work with
20 her every day, we're constantly involved with her,
21 helping -- bringing new, other songwriters
22 together with her to -- and so, as I said earlier,

1 the result is she has a fantastic album today and
2 is doing extremely well.

3 Q. Does EMI Music Publishing continue to
4 work with Ms. Keys even though she has been a
5 commercial success?

6 A. Absolutely.

7 Q. How so?

8 A. Well, as I said, we create
9 collaborations for her which expand the nature of
10 her music and enhance it. But we -- it's really
11 important in all of this to understand that we
12 don't claim credit for -- for Alicia Keys. Alicia
13 Keys did it. What we provided to her was the
14 tools that she could avail herself of to become
15 the great success that she was, and that's the
16 service we provide. The big service we provide
17 her was the financial support to get there.

18 And the -- but we also -- James Blunt
19 is a good example of other tools that were applied
20 to help make -- help him become a successful
21 songwriter. Again, we identified him, found him,
22 signed him. He was not associated with a

1 record -- did not have a record deal at the time.
2 In fact, it was almost impossible to get him a
3 record deal. But before we did that, we put him
4 together with some of the greatest songwriters
5 working, and he honed his craft. He got his songs
6 into a place where they were commercial, and
7 You're Beautiful, I think, will run through most
8 everybody's brain because it's sort of imprinted
9 on it. And the -- and we found him a record
10 label, a small label associated with Warner Music,
11 who believed in him.

12 But it was not music that was readily
13 accessible through radio in the United States. So
14 how do you -- so we worked very closely with him
15 and with the record label to develop opportunities
16 to expose his music in other ways so there would
17 become broader demand. Synchronizations in -- you
18 know, we arranged for him to appear on Oprah,
19 which was a fantastically good thing, and so on.
20 A lot of opportunities.

21 And that's how we try and use our
22 business to do that, in conjunction with others

1 who are equally interested. Certainly, Warner
2 Music did a fabulous job with James, and I
3 wouldn't want to -- want anybody to come away from
4 this thinking that somehow we, on our own, made
5 him a success. He was made -- he made himself a
6 success, and we and the record label helped him do
7 that.

8 Q. Did you make an advance -- did EMI
9 Music Publishing make an advance --

10 A. Yes.

11 Q. -- to help Mr. Blunt?

12 A. Yes, we did, and again, all of that
13 work I talked about to try and get his songwriting
14 and songs up to a level took time. And that meant
15 he had -- and took dedication of his time. And he
16 needed financial support. So we spent close to
17 \$300,000 before he actually had a record deal.

18 Q. Does EMI Music Publishing continue to
19 work with Mr. Blunt today?

20 A. Yes? Yes, indeed.

21 Q. Now, you've mentioned two specific
22 artists, Alicia Keys and James Blunt that EMI

1 helped discover and develop. Are they typical of
2 songwriters you work with?

3 A. I only wish they were typical. The
4 fact is that most of the songwriters that we
5 represent do not have that level of success. And
6 the -- obviously we don't enter into an agreement
7 with a songwriter or -- in the expectation they
8 won't be successful. That's why we do it. But
9 the issues of creative development, the issues of
10 market forces, just the vagaries of the world
11 militate towards -- against having that sort of
12 success.

13 Q. What resources does EMI Music
14 Publishing devote to discovering new talent?

15 A. Well, we obviously have -- as I said
16 earlier, we have a staff. Most people call it an
17 A&R function. We call it -- actually, for
18 ourselves, we call it the creative function
19 because we don't -- we look at it as having a
20 broader sort of set of responsibilities. But it's
21 a worldwide effort, and the -- and it accounts for
22 something on the order of about \$15 million of

1 overhead costs directly -- these are direct costs
2 related to that -- but the whole business is -- I
3 always find it -- again, I look at the business as
4 holistic. I mean, all of the things I've talked
5 about, the ability to license things and to get --
6 are all about the fabric of helping develop an
7 artist, discover and develop an artist, or a
8 songwriter.

9 Q. I would like for you to look at what
10 was submitted as Exhibit CO 201 to your written
11 statement, which is part of Exhibit 3.

12 A. Yes. Yes, there is that word, A&R
13 budget, yes.

14 Q. Can you tell the court what this is,
15 please?

16 A. This is extracts of our financial
17 information that we maintain in our P&L. These
18 are P&L accounts that have been brought together
19 to represent the -- what we spend on A&R or what,
20 as I called it, creative. And, again, these are
21 direct costs, and as I said earlier, if you look
22 at the second box down, which is the U.S., we

1 spend about \$15 million on -- per annum on the
2 direct costs of identifying and helping to develop
3 songwriters. That's our internal overhead costs,
4 I mean.

5 Q. Now, does -- do these resources make
6 finding new talent easy?

7 A. Well, no. No. It's not easy to find
8 people of great talent. I think we all know that
9 in all -- in all fields.

10 Q. Well, in the last couple years, for
11 example, how many songwriters has EMI Music
12 signed?

13 A. Well, roughly, we identified --

14 CHIEF JUDGE SLEDGE: I'm sorry. I
15 didn't hear the question. How many songwriters --

16 BY MR. BLOCH:

17 Q. -- has EMI Music Publishing signed.

18 CHIEF JUDGE SLEDGE: Signed.

19 THE WITNESS: Signed. In other words,
20 entered into an agreement with to represent.

21 It works out to be around 60 a year
22 that we are involved -- newly involved with.

1 BY MR. BLOCH:

2 Q. Are you familiar with the terms of the
3 contracts that EMI Music Publishing enters into
4 with songwriters?

5 A. Yes.

6 Q. Are there certain terms that are
7 typical in EMI Music Publishing's contracts with
8 songwriters?

9 A. Yes.

10 Q. Can you tell us what they are?

11 A. Well, I mean, I think -- you know,
12 contracts have many terms, but I think the ones
13 that are probably most pertinent here are the --
14 the headline financial terms, and there are two
15 aspects of them. There is -- we're providing a
16 service, so we get paid -- we get paid a fee, if
17 you will. And the -- and that fee is essentially
18 an at-risk fee. It's a proportion of future
19 revenues that are -- that we're able to obtain in
20 connection with the compositions we represent. So
21 that's the so-called split percentage that remains
22 with EMI or the percentage that moves on to the

1 songwriter we represent.

2 The other is the advance, which is a
3 cash amount that is paid in advance of receiving
4 or earning royalties. So that's an amount that is
5 an advance against the share that the songwriter
6 retains. And it's an -- for us, it's an at-risk
7 amount of money. It's a non-recourse advance. So
8 that means if those songs don't earn that money,
9 we don't get it back and the songwriter doesn't
10 have to pay us back.

11 Q. With regard to the split, how is that
12 determined?

13 A. Well, splits -- I think both items,
14 both the splits and the advances, are a
15 combination -- really relate to risk. Now, there
16 is a baseline business. We have overhead costs
17 that we have to return, and so we look to -- so we
18 have a base business cost. And we -- but we put
19 that entire operating base at risk against the
20 songs that we represent. So we need to return
21 that. We think about that.

22 But then there is a question of the

1 risk of -- of capital. So if we put an advance
2 up, then we need to get a return on it. The
3 greater the risk, the greater the return has to
4 be. And where the return comes is in the split.
5 So if you have a very high risk, you would have a
6 higher -- you would have a higher -- you would
7 have a higher share than if the risk was lesser.
8 And that's why you will see major artists, major
9 songwriters who are very successful having low
10 splits even though they have large advances,
11 because the risk in that is not as great as for an
12 unknown artist.

13 Q. Is there a typical or more common split
14 today between songwriter and publisher?

15 A. Yes. Essentially, the typical is
16 really sort of the -- is really in the lower
17 quintile of -- of deals, but it is typical, is
18 75/25. Now, again, these are simplified views
19 because there are very many -- there are lots of
20 aspects, but in our industry you would talk about
21 a 75/25 deal, and people would know what that
22 meant. Generally it means 75 percent of the

1 revenues that are generated remain with the
2 songwriter and 25 percent goes with the -- is
3 retained by the publisher or, in our case,
4 obviously us.

5 Q. I would like you to look at what was
6 submitted as Exhibit CO 202 to your written
7 statement.

8 A. Yes.

9 Q. Do you see that?

10 A. I do.

11 Q. Can you tell us who prepared this
12 document?

13 A. This was prepared by our finance group.
14 And it's an extract of our business -- of our P&L.

15 Q. Is it based on actual financial -- EMI
16 Music --

17 A. Yes.

18 Q. -- Publishing --

19 A. Yes.

20 Q. -- financial information?

21 A. Yes.

22 Q. What does this exhibit show?

1 A. Well, it reflects what our total
2 revenues are for a series of years, as you see,
3 and the overheads in each of those years, and
4 the -- and these are U.S. dollars. And the -- and
5 the -- and then it shows the amounts of advance
6 payments that are made in any of those years. So
7 if you took 2005, what you would see is that we
8 had 229 million of revenues, 36.8 million of
9 overheads and 54.8 million of advance payments.

10 That means that our advance payments
11 represented about 24 percent of our gross
12 turnover, or almost 150 percent of our overheads.
13 And perhaps, I think it is -- and I will say this
14 for myself, because it's my statement -- it's a
15 bit misleading to talk about it as a percentage of
16 revenue. Most of that revenue doesn't belong to
17 us. All right. Maybe the better way to think
18 about it is, what is it of your profits, your cash
19 flow? It represents about 100 percent of our cash
20 flow.

21 So, in essence, what we are looking at
22 is, effectively, rolling forward, putting to work

1 the cash flow that we generate in every year,
2 investing it forward into the -- into new deals.

3 Q. Do you know what the final figures were
4 for your fiscal year 2007?

5 A. Yes. It was -- certainly on advances,
6 it was more in the mid-70s.

7 Q. Seventy --

8 A. Seventy million dollars. It varies, by
9 the way -- this is a number that varies based upon
10 how effective you are at finding songwriters that
11 you want to support.

12 Q. Does EMI typically expect to recoup all
13 of these advances?

14 A. We don't make them with the expectation
15 we won't get them back. So the answer is yes, we
16 do expect to, but that's not necessarily what
17 happens.

18 Q. I would like you to look at what has
19 been marked as Exhibit CO 203 to your written
20 statement.

21 A. Right. Okay. This document is a
22 direct extract from our balance sheet, schedule

1 off of our balance sheet. And it is, in effect --
2 it, in effect, shows what the royalties are, and
3 maybe again -- why don't we just take that 2005
4 number.

5 Q. Well, if I can, let me ask you --

6 A. Okay.

7 Q. -- what this exhibit shows for the
8 United States.

9 A. Oh, yes. So we have to go to the
10 second page. I'm sorry. If we go to the second
11 page -- so let's take 2005. This is a balance
12 sheet item, so it says how much do you have
13 outstanding in this investment?

14 So in -- at the start of 2005, we had
15 \$225,620,000 invested in advances. That year, we
16 made -- I will do rounding -- approximately 60
17 million of additional investments. And then
18 there -- but we also got back -- because we put
19 money out, and we got recoupments. People
20 repay -- you know, royalties were able to repay
21 75.9 million. So that meant at the end of the
22 year we had \$209,265,000 of gross investment in

1 advances.

2 Now, the number that I think is pretty
3 compelling here is that if you go down below that
4 line -- and these are accounting entries; this is
5 what the auditors have certified as -- the
6 question is how much of that 209.3 million is
7 recoverable, will you get back? And the accounts
8 reflect that 121 million of it is not recoverable.

9 So we put out 209 million, and we're
10 going to get back less than half of it, according
11 to this. So there is -- previously we had taken a
12 charge of 113 million, and then we took an
13 additional charge of 7 million, and like all
14 accounting things, there's this something, "other
15 movements," which I could take you through, but
16 it's de minimis.

17 Q. Well, let me ask you, from your
18 experience as EMI Music Publishing's former chief
19 financial officer and as its current CEO, what's
20 the significance of this data in terms of the
21 financial risk that EMI takes in making advances
22 to someone?

1 A. Well, if you -- if you look at the
2 accounting, the accounting tells you that you have
3 more than a 50 percent chance of losing your
4 investment.

5 Q. Well, why, then, does EMI Music
6 Publishing take that risk?

7 A. Because when you put the -- when you
8 put the economics together and where you have
9 succeeded, where you -- it is sufficiently high
10 enough to essentially repay this amount of money
11 and to get a return, and that's basically what
12 the -- that is the name of the game. The name of
13 the game is to invest your money wisely so that
14 where you have been successful, you're
15 sufficiently successful to offset the costs
16 related to your mistakes.

17 Q. I would like you to look at what has
18 been --

19 A. And I hate to use that word, mistakes,
20 because I don't think there are ever mistakes. I
21 think they just didn't earn.

22 Q. I would like you to look at what was

1 marked as Exhibit CO 204 to your written
2 statement.

3 CHIEF JUDGE SLEDGE: Mr. Bloch, when do
4 you want to recess for lunch?

5 MR. BLOCH: This is as good as time as
6 any.

7 CHIEF JUDGE SLEDGE: Is this convenient
8 to your presentation?

9 MR. BLOCH: Sure.

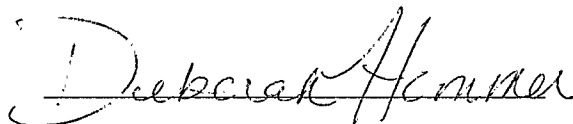
10 CHIEF JUDGE SLEDGE: We will recess
11 until 1:10.

12 (Lunch recess.)
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CERTIFICATE OF NOTARY PUBLIC

I, Deborah Larson Hommer, RPR, the officer
before whom the foregoing trial was taken, do
hereby certify that the witness whose testimony
appears in the foregoing transcript was duly sworn;
that the testimony of said witness was taken by me
in stenotype and thereafter reduced to typewriting
under my direction; that said transcript is a true
record of the testimony given by said witness;
that I am neither counsel for, related to, nor
employed by any of the parties to the action in
which this deposition was taken; and, further,
that I am not a relative or employee of any
attorney or counsel employed by the parties
hereto, nor financially or otherwise interested in
the outcome of the action.



Notary Public in and for
the District of Columbia

My Commission Expires:
October 14, 2008

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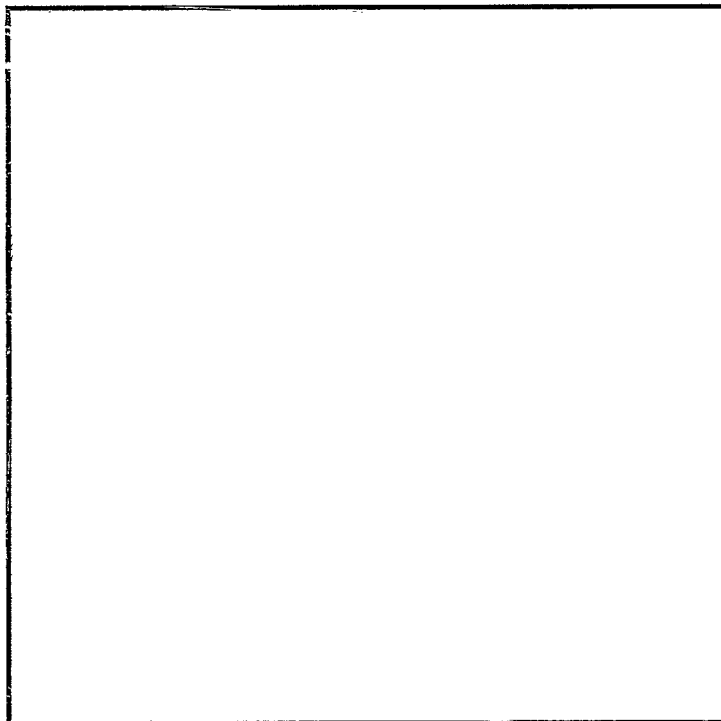
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